IN THE HIGH COURT OF AUSTRALIA

ISKRA

V.

McEACHERN

REASONS FOR JUDGMENT

Judgment delivered at Adelaide

on Friday, 13th September, 1968.

ISKRA

v.

McEACHERN

ORDER

Leave to appeal granted. Appeal allowed with costs. Order that the verdict and judgment of the trial judge be varied by increasing the amount of the verdict from $5988.49 to $9988.49.

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JOINT JUDGMENT

BARWICK C.J.
MENZIES J.
WINDEYER J.

ISKRA

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The appellant submits that the verdict and judgment for $5989.49 given in this case by the Supreme Court of South Australia was inadequate to compensate him for the injury he received and its consequences. There is no need to recite the events out of which the appellant's injuries arose; these appear in the reasons for judgment of the learned trial judge.

He concluded upon all the evidence that as a result of the accident the appellant had suffered "some brain damage and that this together with the resultant subconscious condition has had an effect on his earning capacity". In this conclusion he was, in our opinion, fully justified. The medical evidence clearly supported the view that the appellant, who had suffered a fractured skull and concussion which had kept him unconscious for five days, had not merely been physically damaged but that he had developed a neurosis which was related to his ability to perform work, even though the work itself was otherwise within his physical capacity. The critical question in the case was whether that incapacity resulting in a reduction in earnings had come to an end in October 1966 when the appellant ceased to be employed at the mill where formerly he worked or continued through the succeeding year when the appellant did not work and would probably continue for some time after the conclusion of the litigation. If it ended in October 1966, the amount of the verdict, whilst even in that case small in relation to the injury, and its consequences, including the pain and suffering endured and to be endured by the appellant, would not warrant the grant of leave to appeal. But, if it continued thereafter

for more than twelve months, the matter might be otherwise.

In relation to this critical matter, the trial judge expressed two conclusions of fact, which are in a sense inter-related. He first concluded that there was "no satisfactory evidence as to how this employment", i.e. his employment at the mill in October 1966 "was terminated": and, secondly, he said that he saw "no reason why he could not have gone back to work if he had chosen to do so when he was offered employment at Penola". In this latter connection his Honour said that "Dr. Jarvis confirmed that the plaintiff had been offered work suitable to his condition at Penola but had refused it because he refused to leave Nangwarry". In our opinion, it was because of these conclusions that his Honour in substance held that any inability to work at all which the accident had caused had ceased when he, the appellant, as his Honour evidently thought, unnecessarily and unreasonably terminated his employment at the mill in October 1966. This amounted to a finding that thereafter the appellant was malingering.

However, with great respect, we are of opinion that his Honour was mistaken in these conclusions which, in our opinion, are not borne out by the evidence. The evidence disclosed that the appellant on his return to the mill after a period of convalescence following upon the accident had been put to work in the Box Mill side of the mill where the work was light. Apparently the appellant did this work; but for the purposes of its own organisation the mill transferred the appellant to the Green Section of the mill where the work was heavier. This work the appellant was only able to do for relatively short periods of time during each day with the result that he began to absent himself from work and apparently at times from the premises for portions of the day. Ultimately, he was called to the mill manager's office and immediately thereafter ceased to work at the mill. He said he was

discharged because he could not do the work allotted to him, i.e. in the Green Mill, and that there was no suitable work for him elsewhere at the mill, but it would seem from a question put to him by the respondent's counsel in order to obtain his assent to its terms, that he was allowed to resign in order to maintain his entitlement to leave rather than be dismissed. This account of the appellant's work at the mill and of his being called to the manager's office before he ceased to work at the mill was substantially corroborated by the leading hand in the Green Section of the mill.

The evidence of Dr. Jarvis as to the offer of work to the appellant by the Commonwealth Employment Bureau in Penola and as to the appellant's refusal to accept the offered work is far from clear. It certainly does not definitely appear from it that Dr. Jarvis said that the appellant refused to work in Penola at work which in Dr. Jarvis's opinion the appellant was then capable of doing. Rather that evidence suggests that Dr. Jarvis did not consider that the pine tree planting work at Penola which was offered to him was within the appellant's capacity at the time.

If his Honour had been able to believe the appellant's account of the termination of his employment at the mill and not been satisfied that there was no reason for the appellant to refuse to work at Penola, quite clearly he would have taken a different view of the length of time during which the appellant's disability due to a combination of brain damage and neurosis curtailed his ability to work. We are of opinion that the preponderant inference to be drawn from all the evidence, including the medical evidence, is that the appellant's failure to work during the period which had elapsed between his leaving the mill and the date of the trial was due, not to malingering, but to a neurosis, apparently a concomitant

of his brain damage, caused by the accident. This neurosis was real in the sense that it was compelling and beyond the control of the appellant. Further, in our opinion, the better conclusion upon that evidence is that it would continue to operate at least until the conclusion of the litigation has had its effect upon the appellant and the appellant, as one of the medical witnesses put it, had found "his niche". The appellant therefore suffered economic loss in the form of diminished earning capacity for a determinate estimable period for which the amount included for economic loss in the trial judge's assessment was clearly inadequate. It seems to us inevitable on the view of the facts which we think the correct view that that amount is so inadequate as to justify the grant of leave to appeal. The question then arises as to the proper sum to be awarded by way of general damages. The items of damage to be covered by the global assessment are the injury itself causing loss of personal amenity and some loss of earning capacity for an indefinite time reflected in his inability when at work to earn as much as he did before the accident, set by the parties at about $1.50 per week, pain and suffering and economic loss in the period he was unable, due to the combination of brain damage and neurosis, to work at all.

The terminal point of the latter period can be no more than a matter of judgment but the medical evidence does enable that judgment to be made on that evidence. It can be related to the termination of the litigation. Having considered the various elements of the general damages which we have listed, we are of opinion that the proper award for general damages should be the sum of $8,000. Consequently, we would grant leave to appeal, allow the appeal with costs and vary the verdict and judgment of the trial judge by increasing the amount of the verdict from $5988.49 to $9988.49.